Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

October Term, 1994

INDUSTRIAL EXCESS LANDFILL INC.,
HYBUD EQUIPMENT CORPORATION and
HYMAN BUDOFF,

Petitioners,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the District Court have abstained from exercising jurisdiction?

   A. Did the District Court (and Sixth Circuit) fail to follow this Court's precedent on when a district court should abstain from exercising discretionary jurisdiction under the declaratory judgment and diversity of citizenship statutes, 28 U.S.C. §§1332 and 2201?

   B. Did the District Court (and the Sixth Circuit) fail to follow the Sixth Circuit's own precedent and that of other circuit courts, thereby creating a conflict in the circuit courts?

2. Are the due process and equal protection clauses of Amendment V of the U.S. Constitution violated when the District Court and the Sixth Circuit failed to follow U.S. Supreme Court precedent, their own precedent and are in conflict with precedent of other circuits in applying the law applicable to review of summary judgment motions to the facts which exist in this case?

3. Did the District Court err in failing to apply Rule 1004 of the Federal Rules of Evidence to the secondary evidence submitted in support of the existence and basic terms and conditions of the lost or destroyed policies?

4. Are the Civil Rules and the due process and equal protection clauses of Amendment V of the U.S. Constitution violated when the District Court and Sixth Circuit dismiss **sua sponte** counts one and two of Petitioner's counterclaim?

5. Are the due process and equal protection clauses of Amendment V of the U.S. Constitution violated when the District Court erroneously rules that post judgment motions filed by Petitioners were moot and the Sixth Circuit completely failed to address the issue?

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1. *Hartford Accident & Indemnity Company v. Industrial Excess Landfill, Inc., et al.*, Case Nos. 93-3689 and 3765 (6th Cir.).

   a. Per Curiam Opinion filed January 27, 1995.

   b. Rehearing Order filed March 15, 1995.

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c. Marginal Entry Order filed July 21, 1992.

d. Order filed August 11, 1992.

e. Memorandum of Opinion and Order filed May 10, 1993.

f. Marginal Entry Order filed June 10, 1993.

All of the foregoing are included in the Appendix, infra.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

1. The per curiam opinion of the United States Court of Appeals for the Sixth Circuit in *Hartford v. IEL* is dated January 27, 1995.

2. The Sixth Circuit denied a rehearing in *Hartford v. IEL* by order filed March 15, 1995.

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. Amendment V of the Constitution of the United States.

2. 28 U.S.C. §1332

3. 28 U.S.C. §2201

All of the foregoing provisions are set forth in the Appendix, infra.

STATEMENT OF THE CASE

Hartford Accident and Indemnity Company ("Hartford") filed its complaint for declaratory judgment commencing this case against Industrial Excess Landfill, Inc., Hybud Equipment Corporation, and Hyman Budoff ("Petitioners") in the United States District Court for the Northern District of Ohio ("the District Court"), Case No. 5:90CV0493.[1] Generally, Hartford sought a declaratory judgment under 28 U.S.C. §2201 that it was not obligated to provide a defense or indemnity to the Petitioners under five comprehensive general liability insurance policies[2] for a civil Superfund case that had been filed against the Petitioners (and others) by the United States, which is styled *United States v. Industrial Excess Landfill, Inc., et al.*, Case No. 5:89CV1988 (USDC ND Ohio) ("the USEPA case"). Hartford claimed diversity jurisdiction under 28 USC §1332. The complaint was amended to include a civil Superfund case filed against the Petitioners (and others) by the State of Ohio in 1991, which is styled *State of Ohio v. Industrial Excess Landfill, Inc., et al.*, Case No. 5:91CV2559 (USDC ND Ohio) ("the OEPA case").

Petitioners timely filed motions to dismiss the complaint and amended complaint challenging the jurisdiction of the District Court and arguing that U.S. Supreme Court, Sixth Circuit and other circuit court precedent required abstention and dismissal under the facts presented by this case. The District Court issued Marginal Entry Orders denying the motions to dismiss without any opinion, comment or explanation. Appendix, *infra* at A-5 and A-13.

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[1] In accordance with Rule 29.1 of the Revised Rules of the Supreme Court of the United States, Petitioners state that Hybud Equipment Corporation is a wholly owned subsidiary of Hybud Waste Industries, Inc. Industrial Excess Landfill, Inc. has no parent company or subsidiaries.

[2] The five insurance policies can be logically divided into two groups: the 1968-1971 policies and the 1981-1985 policies. The reason for the important distinction between the two groups boils down to the fact that the 1968-1971 policies did not and could not contain a pollution exclusion.

Petitioners timely filed answers to the complaint and amended complaint, denying that Hartford was entitled to the declaratory judgment it sought, and included with each answer a counterclaim against Hartford claiming that Hartford was liable to Petitioners for breach of contract (Count One) and that Hartford breached the duty of good faith owed to Petitioners as Hartford's insureds (Count Two).[3] Petitioners also included a jury demand.

Hartford filed a motion to dismiss counts two and three of the counterclaim and an answer to count one of the counterclaim. The District Court denied Hartford's motion to dismiss count two of the counterclaim, but granted the motion as to count three of the counterclaim. As to count two, the District Court concluded "that the counterclaim states facts which, if proven, may establish that Plaintiff [Hartford] breached the alleged duty of good faith." Appendix, infra at A-8. No further motions were ever filed as to the counterclaim.

Hartford filed its motion for partial summary judgment on the "lost or destroyed policies" issue,[4] claiming that because Petitioners did not have the policies they could not satisfy their burden of proof. Petitioners denied that they had any burden of proof, but filed documents opposing the motion which included four affidavits and 60 documents establishing the existence and essential terms and conditions of the lost or destroyed policies. In addition, Petitioners argued that Hartford had waived and/or was estopped from denying coverage under those policies.

Hartford filed its motion for partial summary judgment on the pollution exclusion as to the 1981-1985 policies based on

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3 The counterclaim also included a cause of action based on the negligent and/or intentional infliction of severe emotional distress. The dismissal of that cause of action is not part of the appeal.

4 The so-called "lost or destroyed policies" are three successive comprehensive general liability insurance policies issued by Hartford to Petitioners between 1968 and 1971.

collateral estoppel effect from *Hybud Equipment Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), cert. denied _____ U.S. _____, 113 S. Ct. 1585, 123 L. Ed. 2d 152 (1993) (hereafter "Hybud v. Sphere Drake case"). Petitioners opposed the motion because there were questions of fact about whether there were pollution exclusions in those policies and, if there were, whether the underlying facts (which had not yet been determined) implicated the exclusions.

On May 7, 1993, without any hearing, the District Court issued its Memorandum of Opinion and Order granting both of Hartford's motions for partial summary Judgment. The District Court included in its decision a **sua sponte** dismissal of Petitioners' counterclaim. Appendix, *infra* at A-16.

As to the 1981 - 1985 policies, the District Court held that the Hybud v. Sphere Drake case acted as collateral estoppel. As to the 1968-1971 policies, the District Court held that Petitioners did not provide "*any* evidence of the specific coverages, conditions, terms or definitions of the policies at issue" (Emphasis added). Accordingly, Petitioners were determined not to have met their burden of showing they would be covered under the policies.

Petitioners timely filed their Motion for Reconsideration, Motion to Amend the Findings in Judgment, Motion to Revise the Decision, Motion to Alter or Amend Judgment, and Motion for Relief from Judgment or Order ("post judgment motions"), all pursuant to Rules 52, 54, 59 and 60 of the Federal Rules of Civil Procedure. On June 10, 1993, the District Court denied "as moot" the post judgment motions. Appendix, *infra* at A-25.

On January 27, 1995, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed the District Court's decision in a three page per curiam opinion which basically adopted the opinion of the District Court. Appendix, *infra* at A-1.

After denial of their Motion for Rehearing filed in the Sixth Circuit (Appendix, *infra* at A-4), Petitioners hereby petition the Supreme Court of the United States for a Writ of Certiorari to review the merits of various substantial constitutional and other important and highly controversial issues raised by this case.

STATEMENT OF FACTS

This case involves two distinct sets of comprehensive general liability insurance policies issued by Hartford to Petitioners. The first was a series of three policies effective between August 27, 1968 and August 27, 1971 ("the 1968-1971 policies"). The second was effective between August 31, 1981 and June 30, 1985 ("the 1981-1985 policies"). Both sets of policies were issued through Ostrov Insurance Agency, Inc. ("Ostrov"), an agent for Hartford.

Neither Hartford nor Petitioners produced the original or a copy of the 1968-1971 policies in the District Court. Petitioners did produce ample evidence that their copies of the policies had been lost or destroyed. Hartford failed to provide any evidence as to whether or not it had the originals or copies of the 1968-1971 policies, or even to describe its efforts to locate the policies. Hartford merely made bare, unverified allegations that it did not have the policies.

While the policies themselves were not made part of the record of this case in the District Court, there was an overwhelming amount of evidence produced by Petitioners establishing the existence and basic terms and conditions of the 1968-1971 policies. The affidavits of four witnesses, who all had personal knowledge of the insurance matters pertaining to Petitioners during 1968 to 1971, affirmed that Hartford had issued insurance policies to the Petitioners which provided comprehensive general liability ("CGL") insurance coverage to Petitioners. Two of these witnesses were Hartford's own agents and authorized representatives at that time. In addition to the testimony of

the these four witnesses, Petitioners also produced 60 separate documents generated during 1968 to 1971 that establish and corroborate that Hartford had indeed issued CGL insurance policies to the Petitioners. These documents included 33 certificates of insurance, numerous endorsements, correspondence, statements of account, bills, and premium adjustment statements, all of which were issued by Hartford to Petitioners.

In addition to all of the foregoing evidence which was obtained through Petitioners' own sources, Petitioners also offered as evidence of coverage a Hartford interoffice memorandum dated December 14, 1988 in which Hartford employees explicitly admitted the existence of the policies and that they provided coverage to Petitioners for the claims of the USEPA and OEPA. This document is so important and conclusive as to all issues related to the 1968-1971 policies that it is included as part of the Appendix, infra at A-30.

Petitioners also produced a specimen policy, which, according to Hartford's own agent, contains the same or substantially the same language that would have been used in insurance policies issued by Hartford during 1968-1971. There was no pollution exclusion contained in the 1968-1971 policies.

As to the 1981-1985 policies there was conflicting evidence of record as to exactly what were the terms and conditions of each policy, particularly as to whether or not a pollution exclusion endorsement was part of those policies.

The underlying lawsuits for which Petitioner sought its declaratory judgment were civil complaints filed by the United States and the State of Ohio for declaratory judgment relief and a money judgment under §107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9607, as amended by the Superfund Amendments and Reauthorization Act of 1986.[5] The underly-

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[5] The OEPA complaint also includes several other statutory and common law causes of action.

ing complaints do not allege when, how often, or how the release and threats of releases about which the governments complain occurred. Very little discovery has taken place to date in connection with these cases.

Because of the way both the USEPA and Ohio EPA cases have been managed, Petitioners have had little opportunity to take discovery of either the United States or the State of Ohio concerning the nature of the "releases or threat or releases" of pollution alleged in the underlying complaints. Without this discovery, it is impossible to make any determination as to whether the releases or pollution alleged by the United States and State of Ohio are "sudden and accidental" within the meaning of those terms as they have been interpreted by the Supreme Court of Ohio in the *Hybud v. Sphere Drake* case.

ARGUMENT FOR GRANTING THE WRIT

A. The District Court Should Have Abstained From Exercising Declaratory Judgment Jurisdiction And Dismissed The Case.

First and foremost, this case involves important issues about the proper exercise of federal jurisdiction. The failure to abstain from exercising jurisdiction here led the lower courts to an erroneous interpretation and application of state law to the issues presented by the case. This starkly highlights why federal courts should not become involved in cases of this nature in the first place.

In *Green v. Mansour*, 474 U.S. 64, 72, 106 S. Ct. 423, 428, 88 L.Ed.2d 371 (1985), this court said:

> . . . [T]he declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 73 S. Ct. 236, 239, 97 L.Ed. 291 (1952). The propriety of issuing a declaratory judgment may depend upon

> equitable considerations, see *Samuels v. Mackell*, 401 U.S.. 66, 73, 91 S. Ct. 764, 768, 27 L.Ed.2d 688 (1971), and is also "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff, supra*, 344 U.S. at 243, 73 S. Ct., at 240; cf. *Younger v. Harris*, 401 U.S. 37, 44-45, 91 S. Ct. 746, 750-51, 27 L.Ed.2d 669 (1971).

But the court failed to identify and discuss exactly what a lower federal court should consider in determining whether to exercise jurisdiction over a declaratory judgement action. The District Court failed to follow even those limited instructions, and it gave no explanation of its reason for doing so. The equitable considerations at work here all favor the federal courts declining to exercise jurisdiction to determine whether a declaratory judgment should have been issued.

Because this Court in the past has not identified clearly the "equitable considerations" referred to in *Green v. Mansour* or identified the "teachings and experience" there is a lack of uniformity in the lower courts concerning these factors and numerous conflicting results in the lower courts in cases of this nature. These are important and compelling reasons for this Court to hear this case, determine whether jurisdiction was properly exercised here, and clearly state the principles and factors which should be considered (or not considered) by a lower court in deciding whether or not to exercise jurisdiction in a case of this nature.

In *Green v. Mansour* this Court referred to "equitable considerations" and "the teachings and experience concerning the functions that extend over federal judicial power", but failed to identify and discuss exactly what a lower federal court should consider in determining whether to exercise jurisdiction over a declaratory judgment action. This has led to a hodgepodge of cases in the lower courts in which different principles are being defined and applied in different cases. There is a clear conflict

in the circuits concerning whether or not declaratory judgment jurisdiction should be exercised where a case involves matters of purely state insurance law interpretation. Because of the tremendous recent activity in all of the lower federal courts concerning when a federal court should exercise declaratory judgment in a dispute concerning the interpretation and application of insurance policy provisions to a given set of facts, it is critical that this Court promulgate clear guidelines to the lower courts so that there can be a uniformity in result on this crucial question of when a federal court should exercise discretionary jurisdiction in a case involving the interpretation and application of insurance policy provisions. This would have the salutary effect of providing to the lower federal courts the considerations and factors that must or should be taken into account in determining where and when scant federal judicial resources should be spent in issuing a declaratory judgment in matters involving insurance disputes. This would also let the state courts be the primary arbiters of issues of state law and discourage the forum shopping that currently takes place.

The disarray in which these matters currently exist is no better illustrated than the situation which presently exists in the Sixth Circuit where differing results without apparent reconciliation are common place. For example, all of the following cases involve situations where the Sixth Circuit decided that abstention was appropriate in an insurance dispute or that the issue of abstention ought to be explicitly further addressed by the lower court: *Nationwide Mutual Fire Ins. Co. v. Willenbrink*, 924 F.2d 104 (6th Cir. 1991); *Omaha Property & Cas. Ins. Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991) (2-1 decision); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273 (6th Cir. 1990); *Allstate Ins. Co. v. Green*, 825 F.2d 1061 (6th Cir. 1987); *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*, 791 F.2d 460 (6th Cir. 1986); *American Home Assurance Co. v. Evans*, 791 F.2d 61 (6th Cir. 1986). See also *Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir.

1984). These cases stand in stark contrast to other Sixth Circuit cases in which a district court and/or the Sixth Circuit exercised jurisdiction to decide important issues of state law in the context of a declaratory judgment action involving insurance issues. See, for example, *FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990); and *U.S. Fidelity and Guaranty Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988). See also *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 813 F. Supp. 576 (N.D. Ohio 1993); and *Borden, Inc. v. Affiliated FM Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), aff'd 865 F.2d 1267 (6th Cir. 1989). As to this latter group of cases, there was no discussion whatsoever concerning the question of whether jurisdiction should have been asserted. Apparently all of the parties involved there were satisfied with having the federal court exercise jurisdiction in those cases. This is not a satisfactory way of proceeding in as much as jurisdiction is a critical threshold issue in every case which must be satisfied. It must be satisfied at the outset of each litigation or the case should not proceed in federal court. The existence of jurisdiction ought not be the subject of implicit stipulation.

This hodgepodge of case law and results in the Sixth Circuit is also found in other circuits where a similar inconsistency in analysis and results may be found. For example, in the Ninth Circuit a panel of judges recently raised the issue sua sponte and determined that the district court should not have exercised declaratory judgment jurisdiction and accordingly remanded the case with instructions to dismiss. See *America National Fire Ins. Co. v. Hungerford*, _____ F.3d _____, 1995 WL 242286 (9th Cir. 1995). This case followed the heels of *American States Ins. Co. v. Kearns*, 15 F. 3d 142 (9th Cir. 1994) and *Aetna Cas. & Sur. Co. v. Merritt*, 974 F.2d 1196 (9th Cir. 1992) where the Ninth Circuit refused to dismiss insurance disputes. Preceding those cases was *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367 (9th Cir. 1991), where the Ninth Circuit decided that that district court should not have exercised declaratory judg-

ment jurisdiction. This patchwork of inconsistent cases, as illustrated by the Sixth Circuit and Ninth Circuit, may be found in one form or another in virtually all of the other circuits, whether at the circuit court level or within each circuit's district courts. The relatively recent vintage of all these cases shows that this issue pervades the lower courts at this time. See also *Continental Cas. Co. v. Fuscardo,* 35 F.3d 963 (4th Cir. 1994)(2-1 decision that abstention is appropriate); *Continental Casualty Co. v. Coastal Savings Bank*, 977 F.2d 734 (2nd Cir. 1992) (abstention not appropriate); and *Mitcheson v. Harris*, 955 F.2d 235 (4th Cir. 1992) (2-1 decision for abstention).

The current situation leads to the epitome in denial of equal protection and due process because the ultimate decision about whether a federal court will hear or not hear a particular case would seem to depend upon the particular judge or panel to whom the case is assigned, some appearing to favor the exercise of jurisdiction and some appearing to favor dismissal of cases of that nature. The exercise of federal jurisdiction should not depend upon the "luck of the draw". It should depend upon legal and equitable principles that have been well defined and for which guidance is clearly given so that a relatively uniform administration of law is accomplished. The exact opposite would appear to be the situation at the present time, especially as illustrated by this very case.

This case presents an extremely good vehicle for this Court to entertain this important recurring issue and provide guidance to the lower courts including those courts involved in the decisions related to this case. This case involves a situation where this very issue was raised from the outset by Petitioners. The District Court without any analysis whatsoever simply denied Petitioners' motions to dismiss. The Sixth Circuit, without the benefit of any analysis or consideration of relevant factors by which it could determine whether the District Court's exercise of jurisdiction had been proper, simply rubber stamped the

District Court's decision on this issue. Thus, these issues have yet to be squarely addressed in this case.

In light of the clearly conflicting results within and among the circuits and the failure of the lower courts in this case to pay these important issues any consideration whatsoever, this case presents a unique opportunity for this Court to speak out on the issue of the proper exercise of declaratory judgment jurisdiction, provide lower courts in this case and in the many other insurance disputes currently pending or which may be filed in the future clear guidance on when such cases should be entertained and when they should be dismissed.

Although there probably is no one factor that should be considered as conclusive in making a determination of this nature, there do appear to be certain critical factors that would seem to militate in favor of abstention and dismissal; they are:

1. If there is no federal question in the case and the issues are ones of state law.
2. The case involves insurance law, an area that Congress has expressly left to the states through the McCarran-Ferguson Act (15 U.S. §1011-12).
3. Where the state courts have an overriding interest in deciding questions of state law and are best situated to handle such issues. This is especially true where the issues are close and the state precedent is skimpy.
4. Where the filing of the case constitutes a blatant race to the courthouse in response to a claim presented by the insureds in the hope of preempting any state court proceeding.
5. Where there are available state remedies for the resolution of defense and coverage issues.
6. Where the case will result in piecemeal litigation.

7. Where the record is devoid of facts about the underlying actions.
8. Where the sole basis of jurisdiction is diversity of citizenship.
9. Where an insurer has been guilty of failing to give proper notice and other misconduct prior to the filing of the motion.
10. Where a superior alternative remedy exists in the form of an action for indemnity after the conclusion of the underlying lawsuits.

If the preponderance or all of the foregoing factors exist, then a district court should decline to exercise jurisdiction.

If these principles were to be applied to the facts and circumstances presented by this case then dismissal should have been granted. There are no federal questions in this case. The case involved solely insurance law issues, which are purely state law issues. The issues in the case are close and the state precedent is skimpy. The insurer filed the lawsuit before the insureds even received notice of the insurer's positions. Ohio Revised Code Chapter 2721 provides a meaningful response to any need for a declaratory judgment on the part of the insurer by permitting an action in state court and eliminates any need to seek it in the federal courts.

Hartford failed to join the United States, the State of Ohio, or any of the cross claimants in the underlying cases. Thus, they will not be bound by any determination of the issues in this case. If plaintiffs were to obtain judgments against the Petitioners in the underlying actions, their rights against Petitioners' insurance carriers will still have to be determined in supplemental proceedings under Ohio Revised Code § 3929.06. See *Broz v. Winland*, 68 Ohio St. 3d 521, 629 N.E.2d 395 (1994). Thus, this a classic situation of piecemeal litigation.

There have been no determinations made and little discovery taken in the underlying actions. It is very hard if not impossible for insurance policies to be applied in the absence of factual determinations. As shown by the complaint the sole basis of jurisdiction is diversity jurisdiction.

Hartford failed to give proper notice of denial of Petitioners' claim of defense and indemnity. It is undisputed that Petitioners did not receive the denial letter from Hartford until after the lawsuit was filed. Thus Petitioners had no chance to evaluate Hartford's position or react in any manner.

Last, the insurer could file an action after the conclusion of the underlying lawsuits.

Despite all of these equitable considerations in favor of dismissal of this case, the District Court and Sixth Circuit refused to dismiss the case and proceeded to consider the merits. This shows what disarray presently exists in the lower courts concerning when declaratory judgment jurisdiction should be exercised. It is critical for this Court to correct the situation which exists in this case and provide important guidance to the lower courts for the many other cases of a similar nature. It has now been more than 50 years since this Court entertained a question concerning the use of declaratory judgment jurisdiction in an insurance dispute, *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942). It is now appropriate for this Court to revisit this active and controversial issue.

B. The Granting Of A Summary Judgment In Favor Of Hartford Constitutes A Denial Of Due Process And Equal Protection Under The Facts And Circumstances Presented.

In an effort to breathe renewed life into the use of Civil Rule 56, this Court expounded at length about summary judgment practice in the companion cases of *Celotex Corp. v.*

Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). In the years following the issuance of these decisions,many cases have been decided on summary judgment thereby conserving scarce judicial resources while reaching fair decisions as expeditiously as possible. However, the pendulum, as evidenced by this case, has swung too far to encouraging summary judgment. This Court needs to remind the lower courts here and others of the rules related to summary judgment practice and how they should be applied. This case presents just such an occasion.

The first rule of importance here is that of burden of proof. Civil Rule 56 provides that the burden of proof is upon the moving party. Nevertheless, the District Court clearly and explicitly placed the burden of proof upon Petitioners rather than on Hartford as the moving party. Hartford completely failed to meet its burden of proof as a moving party or a plaintiff who filed the lawsuit.

Hartford failed to produce any summary judgment evidence that the 1968-1971 policies did not exist or that they did not provide comprehensive general liability insurance coverage for the Petitioners. Hartford failed to establish that it had no record of the policies being issued to Petitioners for those periods, that it could not reconstruct the policies from its own or other's records, or that it did not have form policies that would have been used for comprehensive general liability insurance policies issued during 1968 to 1971. Indeed, Hartford did not even establish that it looked for the policies. Hartford failed to offer any evidence or even suggest that the 60 documents and 5 affidavits establishing the particulars of the 1968-1971 policies were either false or erroneous.

As to the 1981-1985 policies, Hartford failed to produce a copy of those policies attested to by anyone. Hartford's copy of what it claimed to be the policies were not in summary judgment

form as required by Civil Rule 56. Thus, it should not have been given any consideration by the District Court. *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993).

The second important rule for summary judgment practice is that the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986); *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The District Court failed to apply this rule despite the fact that the evidence submitted by the non-movant, in this case Petitioners, was extensive if not overwhelming on the issues of the existence and basic terms and conditions of the 1968-1971 policies.

The affidavits of four witness, who all had personal knowledge of insurance matters pertaining to Petitioners during 1968-1971, affirmed that Hartford had issued insurance policies to Petitioners which provided comprehensive general liability insurance to Petitioners. Two of these witnesses (Saul A. Ostrov and Patricia Jacobson) were Hartford's own agents and authorized representatives at that time. In addition to the testimony of these four witnesses, Petitioners also produced 60 separate documents generated during 1968 to 1971 that establish and corroborate that Hartford had indeed issued CGL insurance policies to the Petitioners. These documents included 33 certificates of insurance, numerous endorsements, correspondence, statements of account, bills, and premium adjustments statements, all of which were issued by Hartford to Petitioners.

In addition to all of the foregoing evidence which was obtained through Petitioners' own sources, Petitioners also offered as evidence of coverage a Hartford interoffice memorandum dated December 14, 1988 in which Hartford employees explicitedly admitted the existence of the policies and that they provided coverage to Petitioners for the claims of the USEPA and the OEPA. This document is so important and conclusive

as to all issues related to the 1968 - 1971 policies that is quoted here in part and appears in totality in the Appendix, infra at A-30, hereto:

> As we discussed, we are accepting coverage for the periods of August 27, 1968 through August 27, 1971 . . . [T]he hard evidence of the certificates of insurance are proof. The certificates bear valid Hartford policy numbers, and also list limits of liability.
>
> I also checked with Lynn Thoreson who worked in the Akron office in the early 70's. She did remember that we insured Budoff when she first started, and she handled several claims with them.
>
> * * *
>
> Lynn and I discussed this and we are convinced that we would lose any battle over the insurance issue should we decide to fight it. The certificates of insurance, along with the agent's testimony and our lack of ability to prove that the policies didn't exist, coupled with Lynn's recognition that we did insure them back in the early 70's would certainly do us in.

Petitioners also produced a specimen policy that contains the same or substantially the same language that would have been used in insurance policies issued by Hartford during 1968-1971. There was no pollution exclusion contained in the 1968-1971 policies.

While there is no dispute concerning the existence of the 1981-1985 policies, there is a disputed fact concerning whether a pollution exclusion endorsement was contained in the policies. The certified copy of the policy which was received by Petitioners after requests had been made to Hartford's agent, did not include a pollution exclusion endorsement. Prior to receipt of the second policy, Petitioners had no knowledge of the pollution exclusion endorsements claimed by Hartford, nor had Petition-

ers ever previously consented to any attempt by Hartford to include them in the CGL insurance policies which were purchased from Hartford by Petitioners.

Instead of following summary judgment rules and accepting this evidence and finding there to be questions of fact for trial, the lower courts disregarded this evidence and granted summary judgment in favor of Hartford. This problem as well as the foregoing problem constitutes such blatant violations of basic summary judgment rules and practice that it amounts to a violation of due process and equal protection of law.

C. The Failure To Recognize And Apply Rule 1004 Of The Federal Rules Of Evidence Constitutes A Denial Of Due Process And Equal Protection.

Rule 1004 of the Federal Rules of Evidence provides the circumstances under which other evidence of the contents of a writing is admissible where the original writing is not available. Rule 1004 is one of the recognized exceptions to the Best Evidence Rule (Rule 1002). Rule 1004 comes into play in many cases where original writings are not available such as when the writing has been lost or destroyed. It is of particular importance where an old insurance policy cannot be located. This is frequently the case in insurance coverage disputes. See, for example, *Owens Illinois, Inc. v. Aetna Cas. and Sur. Co.*, 990 F.2d 865 (6th Cir. 1993); *Joslyn Mfg. Co. v. Liberty Mut. Ins. Co.*, 23 F.3d 1212 (7th Cir. 1994); *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 975 F.2d 1130 (5th Cir. 1992); *Remington Arms, Inc. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1420 (Del. 1992); *Servants of Paraclete v. Great American Ins. Co.*, 857 F. Supp. 822 (N.M. 1994); and *State of New York v. Blank*, 820 F. Supp. 697 (N.D.N.Y. 1993) aff'd in pertinent part 27 F.3d 783 (2nd Cir. 1994). See also *Andrew Crispo Gallery, Inc. v. Commissioner of Internal Revenue*, 16 F.3d 1336 (2nd Cir. 1994). The age of these cases shows that this issue is a hot issue at this time in the lower courts.

This Court has not previously had an occasion to interpret and provide guidance on Rule 1004. Where this Court has been presented an appropriate occasion for interpreting a rule of evidence, it has not hesitated to accept the case for a full hearing and decision on the merits. See, for example, *Daubert v. Merrell Dow Pharmaceuticals, _____ U.S. _____, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) (interpreting Rule 702).* Just such an occasion is present here with respect to Rule 1004.

In its summary judgment ruling on the 1968-1971 policies, the District Court said that there was not "*any*" evidence of the terms and conditions of the missing policies. The Sixth Circuit did not add anything to the District Court's analysis of this issue in its affirmance.

While it is true that none of the policies were produced to the District Court (because Petitioners' copies had been lost or destroyed), there was ample other or secondary evidence produced about the basic terms and conditions of the policies. This other or secondary evidence consisted of five affidavits and 60 documents, all of which established the essential terms and conditions of an insurance contract under Ohio law: (1) subject matter to be insured, (2) risk insured against, (3) commencement and period of risk undertaken by the insurer, (4) amount of insurance, and (5) premium and time at which it is to be paid. *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N.E. 1060 (1893); *Avemco v. Eaves*, 67 Ohio App. 3d 563, 587 N.E.2d 900 (Adams Cty. 1990); and *Zimmerman Leasing Co. v. Williams*, 64 Ohio App.3d 623, 582 N.E.2d 631 (Lorain Cty. 1989).

The lower courts' failure to accord any significance to the affidavit and documentary evidence concerning the lost or destroyed policies completely emasculates the significance of Rule 1004(1) of the Federal Rules of Evidence which plainly provides for the admission and consideration of secondary evidence of a writing where the originals have been lost or destroyed. There

are numerous cases which provide that other evidence is admissible to establish the contents of an insurance policy where the original has been lost or destroyed. See, for example, *Cipriani v. Sun Life Ins. Co. of America*, 757 F. 2d 78 (3rd Cir. 1985); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213 (SD NY 1986); and *Servants of Paraclete v. Great American Ins. Co.*, 857 F. Supp. 822 (NM 1994). These cases and many others addressing this issue clearly say that the question of whether or not a party has offered sufficient evidence to prove the contents of a lost writing is a matter for the trier of fact to decide. Instead, the lower courts here decided the question as a matter of law and in derogation of the Federal Rules of Evidence.

Prior to this case, there was no precedent for deciding a lost or destroyed policies case by summary judgment rather than at trial. Moreover, this evidence establishes waiver and estoppel against Hartford. Under Ohio law, the issue of waiver and estoppel of an insurance company is ordinarily a question of fact. *State Automobile Mut. Ins. Assn. v. Lind*, 122 Ohio St. 500, 172 N.E. 361 (1930); *Ohio Farmers Ins. Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922). In accord, *Ranes v. Paul Revere Life Ins. Co.*, 32 F.3d 1393 (9th Cir. 1994)(applying Washington law); *Mass. Mut. Life Ins. Co. v. O'Brien*, 5 F.3d 1117 (7th Cir. 1993)(applying Illinois law); *Sur v. Glidden-Durkee*, 681 F.2d 490, 495-6 (7th Cir. 1982)(applying Indiana law); and, generally, 44 Am. Jur. 2d, Insurance § 2050 and cases cited therein.

D. It Is A Violation Of The Civil Rules, The Due Process And Equal Protection Clauses Of The Fifth Amendment Of The U.S. Constitution And Basic Principles Of Justice And Fair Dealing For The District Court To Dismiss Sua Sponte Counts One And Two Of Defendants' Counterclaim.

At the end of its Memorandum of Opinion filed May 7, 1993, the District Court sua sponte "dismissed" Petitioners' counterclaim. Hartford had made no motion for summary judgment related to the counterclaim. Previously, the District Court had denied Hartford's motion to dismiss count two of the counterclaim. Hartford never filed any motion to dismiss as to count one of the counterclaim.

The sua sponte dismissal of the counterclaim was procedurally and substantively defective and constituted error. The Sixth Circuit did comment that the District Court's action was not in compliance with Civil Rule 56(c) in that the action was taken without notice and an opportunity to be heard, but affirmed the dismissal because it believed that the counterclaim was based solely on the same facts that gave rise to the summary judgment.

Petitioners had no knowledge that their counterclaim was under review. No motion was pending addressing the counterclaim. Petitioners had no opportunity to defend their counterclaim. The District Court, and ultimately the Appeals Court, completely ignored the procedural safeguards of Civil Rule 56.

Before summary judgment may be granted against a party, Civil Rule 56(c) mandates that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the District Court. *Routman v. ADP*, 873 F.2d 970, 971 (6th Cir. 1989). The Sixth Circuit failed to follow its precedent that where a district court is contemplating entering summary judgment sua sponte against

one of the parties, that party is entitled to unequivocal notice of the court's intentions. *Routman v. ADP*, supra at 972; *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984), cert. denied 486 U.S. 1032, 108 S. Ct. 2015, 100 L. Ed. 2d 602 (1988); and *Harrington v. Vandalia-Butler Board of Education*, 649 F.2d 434, 436 (6th Cir. 1981). The whole purpose behind this rule is to give a party a reasonable opportunity to respond to all issues to be considered by the District Court. Other circuit courts uniformly agree with these basic principles. See, for example, *National Fire Ins. v. Bartolazo,* 27 F.3d 518 (11th Cir. 1994) *Thoen v. United States*, 765 F.2d 1110, 1114 (Fed. Cir. 1985); *Indiana Port Comm. v. Bethlehem Steel Corp.*, 702 F.2d 107, 111 (7th Cir. 1983) and cases cited therein; and *Portland Retail Druggist Assn. v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981), cert. denied 469 U.S. 1229, 105 S. Ct. 1230, 84 L. Ed. 2d 368 (1985). Several circuits, including the Sixth Circuit, have linked these procedural requirements to the constitutional due process right to be heard. *Management Investors v. United Mine Workers*, 610 F. 2d 384, 390 (6th Cir. 1979); *Thoen v. United States*, supra at 1114; and *Winbourne v. Eastern Airlines*, 632 F.2d 219, 224 (2nd Cir. 1980).

The rulings of the lower courts failed to consider the conceded fact that Hartford did owe some contractual duties under the 1981-1985 policies. Regardless of the outcome of the defense and coverage issues under those policies for the underlying EPA cases, Hartford owed Petitioners the duty of good faith throughout. *Bullett Trucking v. Glen Falls Insurance Company*, 84 Ohio App.3d 327, 616 N.E. 2d 1123 (Montgomery Co. 1992); *LeForge v. Nationwide Mutual Fire Ins. Co.*, 82 Ohio App.3d 692, 612 N.E. 2d 1318 (Clinton Co. 1992), jur. mot. over. 66 Ohio St.3d 1413 (1993). Hartford produced no evidence whatsoever that it met that standard of good faith, let alone undisputed evidence that would entitle it to summary judgment. Many of the specific grounds of bad faith set forth in the counterclaim, which the District Court previously found suffi-

cient to overcome a motion to dismiss, did not depend upon the finding that there was a specific duty to defend or to provide coverage for the underlying cases.

Clearly, Petitioners' rights under the Federal Rules of Civil Procedure and the due process and equal protection clauses of the U.S. Constitution were violated by the District Court's sua sponte ruling on the counterclaim. Petitioners had no notice that their counterclaim was under attack, and no opportunity to respond to any arguments that the counterclaim should be disposed of on summary judgment. It was fundamentally unfair to dismiss the counterclaim under those circumstances.

E. The District Court Erred By Denying Petitioner's Post Judgment Motions.

On June 10, 1993, the District Court denied "as moot" Defendants' post judgment motions. The District Court simply used a rubber stamp to make this ruling. It is apparent from this that the District Court did not reach the merits of the post judgment motions. The District Court apparently believed that it lacked jurisdiction to entertain the motions on their merits because a notice of appeal had been filed. The Sixth Circuit completely failed to address this issue in its opinion and instead commented on a few matters other than this issue and otherwise adopted and incorporated the District Court's opinion which preceded this rubber stamp ruling.

The lower courts were wrong in failing to consider this issue on its merits. The post judgment motions contained newly discovered evidence directly impacting upon the District Court's summary judgment analysis. After the District Court made its summary judgment rulings, Ostrov personnel again reviewed their records for copies of the 1968-1971 policies. While those policies could not be found, Ostrov did find a copy of a specimen policy that contained the same or substantially the same language as the language of the 1968-1971 policies. This specimen policy constitutes further evidence of the "specific

coverages, conditions, terms or definitions" which the District Court said it needed to have to declare rights and duties under the 1968-1971 policies. The failure to even consider this motion on the merits violates the civil rules and basic notions of due process and equal protection.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted and this case be accepted for a review of the merits of all of the foregoing issues.

Respectfully submitted,

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(Decided January 27, 1995)
Nos. 93-3689/2765

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

HARTFORD ACCIDENT AND INDEMNITY CO.,

Plaintiff-Appellee,

v.

INDUSTRIAL EXCESS LANDFILL, INC., *et al.*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: LIVELY, JONES and DAUGHTREY, Circuit Judges.

PER CURIAM. The plaintiff, Hartford Accident and Indemnity Company, brought this diversity action in the district court seeking a declaratory judgment that it was not liable to its insureds, defendants Industrial Excess Landfill, Inc., Hybud Equipment Corp., and Hyman Budoff, under five comprehensive policies issued by the plaintiff at various times over a 16-year period. Invoking their rights under the policies, the defendants had called upon Hartford to defend and indemnify them in a consolidated CERCLA action brought by the United States Environmental Protection Agency and the Ohio Environmental Protection Agency that was then pending in federal court. The district court granted summary judgment to Hartford on all the policies at issue in the declaratory judgment suit and, *sua sponte*, dismissed certain counterclaims by the defendants.

We find no merit to the issues raised by the defendants on appeal, and we therefore affirm.

Indeed, our review of the record, the briefs, and the district court's memorandum opinions in this case convinces us that the district court's judgment was correct in its essential aspects. We further conclude that the judgment should be affirmed for the reasons given by the district court, without the necessity of further written explication on those issues covered in the court's opinion.

Two additional matters require comment, however. One is a jurisdictional question not raised below and, therefore, not treated in the district court's opinion. The defendants insist that under well-settled Sixth Circuit precedent, district courts should decline to exercise diversity jurisdiction in declaratory judgment actions involving insurance disputes but no federal questions. Here, they contend, there is no federal question and the case involves insurance law, an area of litigation and resolution best left to the states. We note, however, that all of the cases cited by the defendants in support of abstention involved concurrent state court actions giving rise to, among other things, the possibility of conflicting or inconsistent rulings on the same issue.

Here, both the declaratory judgment action and the underlying action were pending in the Northern District of Ohio. As for the substantive issue of law raised in the declaratory judgment action, *i.e.*, whether the pollution exclusion clause in the Hartford insurance policies applied to the facts pleaded in the CERCLA action, that question had already been determined as a matter of state law by the Ohio Supreme Court in its opinion in *Hybrid Equipment Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), *cert. denied*, 113 S..Ct. 1585 (1993), involving the same facts, the same insureds, and the same pollution exclusion clause at issue in this case. We conclude that the declaratory judgment action, having been litigated to this point, should not be dismissed for lack of

jurisdiction. In reaching this determination, we are guided by the standards set out in *Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1063 (6th Cir. 1987).

One other issue raised on appeal requires at least a brief comment. Although it appears that in dismissing the defendants' counterclaims *sua sponte*, the district judge was not in compliance with Rule 56(c) of the Federal Rules of Civil Procedure, it further appears that this action was taken without notice and an opportunity to be heard because the counterclaims were based *solely* on the same facts that gave rise to the summary judgment in the plaintiff's favor. Under these circumstances, we cannot say that the order of dismissal constituted reversible error.

The judgment of the district court is AFFIRMED.

Decided March 15, 1995

Nos. 93-3689/2765

United States Court Of Appeals

FOR THE SIXTH CIRCUIT

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff-Appellee,

v.

INDUSTRIAL EXCESS LANDFILL, INC., ET AL.,
Defendants-Appellants.

ORDER

BEFORE:LIVELY, JONES, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Granted: _____
Denied: __X__
/s/ John M. Manos
U.S. District Judge

Filed April 30, 1991

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL, INC., et al.,
Defendants.

Case No. 5:90CV0493
Judge Manos

DEFENDANTS' MOTION TO DISMISS

Defendants Hybud Equipment Corp. ("Hybud"), Hyman Budoff ("Budoff") and Industrial Excess Landfill, Inc. ("IEL") (collectively referred to as "Defendants"), hereby move this Court, pursuant to Rule 12 of the Federal Rules of Civil Procedure, to dismiss this case because the Court lacks subject matter jurisdiction, the complaint fails to state a claim upon which relief can be granted, Plaintiff failed to join all necessary and proper parties and the Court should abstain from exercising jurisdiction over this case. More specifically, the complaint should be dismissed for the following reasons:

1. An "actual controversy" within the meaning of 28 U.S.C. §2201 does not exist between the parties;

(Filed February 14, 1992)

In The United States District Court

FOR NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY CO.,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL, INC., et al.,
Defendants.

Case No. 1:90CV0493
Judge Manos

MEMORANDUM OF OPINION

On March 19, 1990, plaintiff, Hartford Accident & Indemnity Co., filed the above-captioned case against defendants, Industrial Excess Landfill, Inc., Hybud Equipment Corp., and Hyman Budoff, seeking a declaration of the rights and liabilities of the parties under several insurance contracts. Jurisdiction is appropriate pursuant to 28 U.S.C. §1332. From 1981 through 1985, plaintiff issued several general liability insurance policies to the defendants. On October 13, 1989, the United States filed a complaint against the defendants herein and others seeking recovery of response costs incurred in the clean-up of a hazardous waste site in Stark County, Ohio. That case was captioned *United States v. Industrial Excess Landfill Inc. et al.*, No. 5:89CV1988 (hereinafter "*USEPA*"). After receiving the *USEPA* complaint, defendants requested that plaintiff indemnify and defend them. Plaintiff filed this action seeking a determination of whether it has a duty to act on behalf of the defendants in the *USEPA* action. On October 10, 1991, the

defendants filed a counterclaim alleging that plaintiff's refusal to provide coverage constitutes a breach of the insurance contracts (Count I), breach of the duty of good faith (Count II), and negligent or intentional infliction of emotional distress (Count III). On November 12, 1991, plaintiff filed a motion to dismiss Counts II and III of the counterclaim. For the following reasons, the motion is denied as to Count II and granted as to Count III.

I.

Pursuant to Fed. R. Civ. P. 12(b)(6), the court may dismiss any count for "failure to state a claim upon which relief can be granted." Dismissal pursuant to Rule 12(b)(6) is appropriate only if no set of facts would entitle the counterclaimants to relief. *See Conley v. Gibson*, 355 U.S. 41 45-46, 78 S. Ct. 99, 102 (1957); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). In considering this motion to dismiss, the court must interpret the facts in the light most favorable to the parties opposing the motion in order to determine whether any set of facts would entitle them to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied*, 111 S. Ct. 182 (1990).

II.

Count II of the counterclaim alleges that plaintiff breached the duty of good faith it owes to the defendants by refusing to pay, defend, or attempt to settle the claims in the *USEPA* action. "Bad faith involves a conscious or deliberate wrongdoing with an actual intent to mislead, deceive, or breach a known duty." *Miller v. Kronk*, 519 N.E.2d 856 (Ohio App. 1987) (citing *Wasserman v. Buckeye Union Cas. Co.*, 290 N.E.2d 837, 840 (Ohio 1972)). An insurance company owes its policy-holders a duty to exercise good faith in defending and settling claims brought against them. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 404 N.E.2d 759 (Ohio 1980). Under Ohio law, a policy-holder may sue an insurance company which demonstrates bad

faith with respect to the settlement of third-party claims. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 404 N.E.2d 759 (Ohio 1980); *Slater v. Motorist Mut. Ins. Co.*, 187 N.E.2d 45 (Ohio 1962); *Hart v. Republic Mutual Ins. Co.*, 87 N.E.2d 347 (Ohio 1949).

Defendants allege the following facts in support of this counterclaim:

(a) Plaintiff failed and refused to make . . . any investigation . . . .

(b) Plaintiff refused to give any reasonable interpretation to the provisions in the policies or any reasonable application of such provisions to Defendants' claims and has acted to protect its own financial interest therein at the expense of Defendants' rights.

(c) Plaintiff has failed to provide Defendants any reasonable or justifiable basis for denying Defendants' claims . . . .

(d) Plaintiff has unreasonably delayed the handling of all of Defendants' claims resulting in prejudice to Defendants.

(e) Plaintiff failed and refused to defend Defendants at critical stages of the underlying claims when Plaintiff knew or should have known that Defendants lacked the resources to fully and completely defend themselves.

(f) Plaintiff failed and refused to provide any settlement dollars or authorization at critical stages . . . [even though] Plaintiff knew or should have known that to do so would increase Defendants' liability exposure.

(g) Plaintiff has made numerous false and erroneous assertions about Defendants as part of its attempt to avoid its obligations.

(h) Plaintiff's refusal to renew its policies with Defendants was in retaliation for Defendants' claims.

(i) Plaintiff's conduct has forced Defendants to seek legal redress.

(j) Plaintiff offered to provide a partial defense to Defendants when Defendants were in a vulnerable position, in an attempt to avoid its absolute nondivisible duty to defend.

(k) Although Plaintiff has paid some defense costs, it initially and for a significant period of time paid nothing when it knew it was obligated to provide a defense.

(l) Plaintiff filed this lawsuit before giving any timely and proper notice to Defendants.

Counterclaim at ¶ 33.

The court concludes that the counterclaim states facts which, if proven, may establish that plaintiff breached the alleged duty of good faith. Accordingly, the motion to dismiss is denied as to Count II.

III.

Defendants allege that plaintiff intentionally or negligently inflicted severe emotional distress by refusing to pay, defend, or attempt to settle the claims against the defendants in the *USEPA* action.

In order for defendants to prove intentional infliction of emotional distress, they must show by a preponderance of the evidence each of the following four elements:

1. the plaintiff's conduct was extreme and outrageous;

2. the conduct was intentional or reckless;

3. the defendants suffered emotional distress as a result of the conduct, and

4. the emotional distress was severe.

Yeager v. Local Union 20, et al., 453 N.E.2d 666 (Ohio 1983). Conduct is considered "extreme and outrageous" if it exceeds all possible bounds of decency and would not be tolerated in a civilized community. *Id.* at 671 (quoting Restatement of the Law 2d, Torts (1965) 73, Section 46, comment d.). An act is reckless if it is done with "conscious disregard for a great and obvious harm." *Schellhouse v. Norfolk & Western Ry. Co.*, 575 N.E.2d 453, 457, n. 2 (Ohio 1991) (quoting *Preston v. Murty*, 512 N.E.2d 1174 (Ohio 1987)).

The counterclaim does not allege operative facts to support the allegation that the plaintiff intended to inflict emotional distress on the defendants. Plaintiff's refusal to defend the *USEPA* claims cannot be the basis for an emotional distress claim. It has not yet been determined whether plaintiff was obligated to participate in the *USEPA* defense. It sought to determine whether such a duty existed by filing this suit. This court finds that defendants plead no facts which, if proven, would amount to the "outrageous" conduct necessary to assert an intentional infliction of emotional distress claim.

In order to assert a claim for negligent infliction of emotional distress, the defendants must allege they were bystanders or witnesses to a sudden negligently caused event and were traumatized by the distressing occurrence. *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Burris v. Grange Mut. Companies*, 545 N.E.2d 83, 90-91 (Ohio 1989); *Bartlett v. Daniel Drake Memorial Hospital*, 1991 WESTLAW 149565 (Ohio App. Hamilton Cty. 1991). The counterclaim does not allege facts to support any element of this claim. For these reasons, the motion to dismiss is granted as to Count III.

IV.

This court concludes that the counterclaim adequately pleads a claim for breach of the duty of good faith, but does not adequately plead a claim for intentional or negligent infliction of emotional distress. Accordingly, plaintiff's motion to dismiss is denied as to Count II and granted as to Count III.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

(Filed February 14, 1992)

In The United States District Court

FOR NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY CO.,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL, et al.,
Defendants.

Judge John M. Manos
Case No. 1:90CV0493
ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, this court concludes that the counterclaim adequately pleads a claim for breach of the duty of good faith, but does not adequately plead a claim for intentional or negligent infliction of emotional distress. Accordingly, plaintiff's motion to dismiss Counts II and III of the counterclaim is denied as to Count II and granted as to Count III.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

Granted: _____

Denied: __X__

/s/ John M. Manos

U.S. District Judge

Filed July 21, 1992

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL, INC., et al.,
Defendants.

Case No. 1:90CV0493
Judge Manos

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants Hybud Equipment Corp., Hyman Budoff and Industrial Excess Landfill, Inc. ("Defendants"), hereby move this Court, pursuant to Rules 12 and 15 of the Federal Rules of Civil Procedure, to dismiss the amended complaint for the following reasons:

1. The amended complaint is not ripe for adjudication.
2. An "actual controversy" within the meaning of 28 U.S.C. §2201 does not exist between the parties;

(Filed August 11, 1992)

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY CO.,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL, et al.,
Defendants.

Case No. 1:90CV0493
Judge Manos
ORDER

On March 19, 1990, plaintiff, Hartford Accident & Indemnity Co., filed the above-captioned case against defendants, Industrial Excess Landfill, Inc., Hybud Equipment Corp., and Hyman Budoff, seeking a declaration of the rights and liabilities of the parties under several insurance contracts. On October 13, 1989, the United States filed *United States v. Industrial Excess Landfill Inc. et al.*, No. 5:89CV1988 (hereafter "*USEPA*"), against the defendants and others seeking recovery of response costs incurred in the clean-up of a hazardous waste site in Stark County, Ohio. After receiving the complaint, defendants requested that plaintiff indemnify and defend them. Plaintiff filed this action seeking a determination of whether it has a duty to act on behalf of the defendants in the *USEPA* action. On June 23, 1992, defendants moved for a continuance of the trial date and for a stay of discovery until the *USEPA* action is finally determined by trial or settlement.

The motion for a continuance is granted. The motion to stay discovery is denied.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

(Issued May 7, 1993)

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY CO.,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL INC., et al.,
Defendants.

Case No. 1:90CV0493
Judge M. Manos

MEMORANDUM OF OPINION

On March 19, 1990, plaintiff, Hartford Accident & Indemnity Co. (Hartford), filed the above-captioned action against defendants, Industrial Excess Landfill, Inc., Hybud Equipment Corp., and Hyman Budoff, seeking a declaration of the rights and liabilities of the parties under several insurance contracts. Jurisdiction is appropriate pursuant to 28 U.S.C. § 1332.

On April 29, 1992, Hartford filed a First Amended Complaint. On July 31, 1992, the defendants filed an amended answer and counterclaim. On July 2, 1992 and October 27, 1992, plaintiff filed motions for partial summary judgment. For the following reasons, plaintiff's motions for partial summary judgment are granted and defendants' counterclaim is dismissed.

I.

Defendants owned and operated the Industrial Excess Landfill in Stark County, Ohio. On October 13, 1989, the United States filed a complaint against them and others seeking recovery of response costs incurred in the clean-up of a hazardous waste site.[1]

On December 19, 1991, the State of Ohio also filed a complaint based on federal and state environmental laws.[2]

Hartford filed this declaratory action after defendants requested that it defend and indemnify them in the USEPA action. Defendants hold a number of insurance policies issued by Hartford. These policies cover the time periods 1968-1971[3] and August 31, 1981 to June 30, 1985.[4] From June 30, 1985 to June 30, 1987 defendants were insured by the Sphere Drake Insurance Company.

On October 10, 1991, defendants filed a counterclaim in which they allege that Hartford's refusal to provide coverage constitutes breach of the insurance contracts (Count I), breach of the duty of good faith (Count II) and negligent or intentional infliction of emotional distress (Count III).

On April 29, 1992, Hartford filed its First Amended Complaint for a declaratory judgment stating that it is not obligated to defend or indemnify the defendants for the USEPA action under the 1981-1985 policies (Count I) or the 1968-1971 policies (Count II) nor for the State of Ohio action under the 1981-1985 (Count III) or 1968-1971 (Count IV) policies.

On July 24, 1992, Hartford moved for partial summary judgment on the 1968-1971 policies. It asserts that there is no coverage because the defendants cannot produce proof of the existence or terms of the policies.

On October 27, 1992, Hartford moved for partial summary judgment for the 1981-1985 policies. It contends that because of the "pollution exclusion" clauses it has no duty to defend or

indemnify in the USEPA or State of Ohio actions. It further contends that the defendants are collaterally estopped from asserting that the "pollution exclusion" clauses do not apply to its coverage.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,106 S. Ct. 2548, 2554 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552.

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[1] The USEPA action, *United States of America v. Industrial Excess Landfill, Inc., et al.*, No. 5:89CV1988 (N.D. Ohio) is pending.

[2] The State of Ohio action, *State of Ohio v. Industrial Excess Landfill, Inc. et al.*, No. 91CV2559 (N.D. Ohio), has been consolidated with the USEPA action and is pending.

[3] Policies 45 C 6777390, 45 C 678909 and 45 C 680280.

[4] Policies 45 CBP 132102 and 45 CBP NH0404.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256, 106 S. Ct. at 2513 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48, 106 S. Ct. at 2510.

III.

A.

On October 27, 1992, Hartford filed a Motion for Partial Summary Judgment. It contends that the defendants' 1981-1985 insurance policies contain a pollution exclusion clause that bars coverage. It further contends that the Supreme Court of Ohio decided this issue and partial summary judgment should be granted under the doctrine of collateral estoppel.

The policies in question are comprehensive general liability policies and they include a "Standard Pollution Exclusion." The exclusion is set forth as follows:

> This insurance does not apply:
>
> (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

On September 16, 1992, the Supreme Court of Ohio decided *Hybud Equipment Corp. et al. v. Sphere Drake Insurance Co., Ltd.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992). The *Hybud* case involved the same insureds, coverage for the same underlying event and the same policy language as here.[5]

The Court in *Hybud* held that the language in the pollution exclusion clause is not ambiguous and that the term "sudden" limits liability to damages caused only by an abrupt release, not damage from pollution that "occurred over an extended period of time." *Hybud*, 597 N.E.2d at 1103.

The Court noted that the USEPA complaint alleged that the insureds had either disposed of or accepted different forms of waste materials in the landfill over an extended period of time, and that the resulting injuries and damage had been caused by the waste deposited. The Court further noted that "a review of the [USEPA] complaint show[s] that there was never any allegation that the release or discharge of the waste happened abruptly or instantaneously." *Hybud* at 1103.

Under Ohio law, an issue is barred from relitigation under the doctrine of collateral estoppel if a party pleads and proves three elements:

(1) mutuality of parties;

(2) the issue was actually tried and decided and necessary to the final judgment in the prior suit; and

(3) the issue is identical to the issue involved in the prior suit.

Dwyer v. City of Middleton, 733 F.Supp. 262, 267 (S.D. Ohio 1989); *see also Gilbraith v. Hixson*, 32 Ohio St.3d 127, 512 N.E.2d 956 (1987).

The defendants in this declaratory action are the same parties that litigated the application of the pollution exclusion clause as plaintiffs in *Hybud*. Although Hartford is not the

insurer in *Hybud*, the mutuality element is not necessary if the party against which collateral estoppel is asserted has clearly had its day in court on the specific issue sought to be relitigated. *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978 (1983). Because the defendants actually litigated the application of the pollution exclusion clause, the element of mutuality is established.

The Ohio Supreme Court's decision in *Hybud* is a final judgment and the application of the pollution exclusion clause was necessary to that judgment. The language in the clause in *Hybud* is identical to the language in this action and the disputed coverage (indemnity for the costs and damages of the USEPA action) is the same.

Therefore, the defendants are precluded from relitigating the issue whether the pollution exclusion clause bars coverage for the USEPA action under the doctrine of collateral estoppel.

B.

In their brief, Hartford contends that it should be granted summary judgment on the 1981-1985 policies for claims arising out of the State of Ohio action. It contends that *Hybud* is controlling and the State of Ohio action is based on the same events or occurrences as the USEPA action.

Defendants respond that the State of Ohio complaint is broader than the USEPA complaint and that it includes theories of common law nuisance and ultrahazardous activity that imply "sudden and accidental" occurrences. However, the State of Ohio complaint arises from the same set of operative facts as the USEPA complaint and alleges that the pollution discharges were done systematically over an extended period of time. It contains no allegations that the release or discharge of the waste happened abruptly or instantaneously. Therefore, Hartford is

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[5] The Sphere Drake policies contained the same "Standard Pollution Exclusion" as the Hartford policies.

not liable under the 1981-1985 policies for the State of Ohio complaint.

C.

On July 2, 1992, Hartford moved for partial summary judgment on the issue of the "Lost or Destroyed Policies." It contends that summary judgment should be granted on the 1968-1971 policies because defendants cannot prove coverage.

Neither party has been able to produce a policy for 1968-1971. However, defendants have provided some evidence that Hybud Equipment Co. held comprehensive general liability policies from Hartford for 1968-1971, including affidavits from defendant Hyman Budoff and Saul Ostrov (Vice President of Ostrov Insurance Agency, the insurance broker) claiming the existence of the policies. Mr. Ostrov attests that the policies were in his company's files and seven years after their expiration were regularly destroyed. Defendants also have produced certificates of insurance, statements of accounts, statements of premium adjustment and general correspondence relating to the policies. However, this secondary evidence relates only to Hybud Equipment Co. as the insured and not Industrial Excess Landfill, Inc. or Hyman Budoff, and does not describe the terms or conditions of coverage.

The nature of an insurer's obligation is not altered or impaired because an original or a complete copy of the policy cannot be produced. *See* Couch on Insurance 2d, *Evidence*, § 79:6. However, when an original is lost or destroyed the party seeking to enforce the policy has the burden of proving its issuance and the terms it contained. *Id.*; *Lynd v. Sandy & Beaver Valley Farmers Mut. Ins. Co.*, 103 Ohio App. 408, 145 N.E.2d 453 (1957). Therefore, under Ohio law, "in order to recover . . . the express terms and conditions relied on must be proven, for the policy and contract are the basis of the insurer's obligation and measure of its liability." *Lynd*, 145 N.E.2d at 456. The

defendants' certificates, affidavits and documents do not provide any evidence of the specific coverages, conditions, terms or definitions of the policies at issue. "Absent the actual terms of a contract, it is impossible for a trial court to declare a party's rights and duties under the contract." *Kleem v. Nationwide Insurance Co.*, 1983 WL 2622 at 2 (Ohio App. 8th Dist. 1983). Defendants have not met their burden of showing that under the terms and conditions of the alleged policies they would be covered. Therefore, as to the 1968-1971 policies, summary judgment is appropriate.

Since Hartford is not liable, defendants' counterclaim is without merit.

Accordingly, Hartford's motions for partial summary judgment are granted and defendants' counterclaim is dismissed.

IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

(Filed May 7, 1993)

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY CO.,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL INC., et al.,
Defendants.

Case No. 1:90CV0493
Judge John M. Manos
ORDER

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, plaintiff's motions for partial summary judgment are granted and defendants' counterclaim is dismissed.

IT IS SO ORDERED.

/s/John M. Manos
UNITED STATES DISTRICT JUDGE

In The United States District Court

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff,

vs.

INDUSTRIAL EXCESS LANDFILL INC., et al.,
Defendants.

Case No. 5:90CV0493
Judge John M. Manos

DEFENDANTS' MOTION FOR RECONSIDERATION, MOTION TO AMEND THE FINDINGS AND JUDGMENT, MOTION TO REVISE THE DECISION, MOTION TO ALTER OR AMEND JUDGMENT, AND MOTION FOR RELIEF FROM JUDGMENT OR ORDER

Now come defendants, Hybud Equipment Corporation, Hyman Budoff, and Industrial Excess Landfill, Inc. ("Defendants") and move this Court, pursuant to Rules 52, 54, 59 and 60 of the Federal Rules of Civil Procedure, for an order from this Court reconsidering, amending and/or altering the Memorandum of Opinion and Order issued May 7, 1993, and Judgment entered May 10, 1993, for all the reasons set forth in the attached Memorandum of Law.

Granted: _____
Denied: √ as moot
/s/ John M. Manos
U.S. District Judge

Issued June 10, 1993

U.S. Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1332(a)

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $50,000, exclusive of interest and costs, and is between --

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. §2201(a)

§2201. Creation of remedy.

(a) In a case of actual controversy within its jurisdiction. except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 USCS §7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or contervailing duty proceeding regarding a class or kind of merchandise of a free trade are a country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 USCS § 1516a (f)(10)]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Evidence, Rule 1004

Rule 1004. **Admissibility of Other Evidence of Contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if --

(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith, or

(2) **Original not obtainable**. No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent**. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) **Collateral matters**. The writing, recording, or photograph is not closely related to a controlling issue.

THE HARTFORD
INTEROFFICE MEMORANDUM

DATE: December 14, 1988

TO: Al Platteis, Supervisor
SEICO, Home Office Claims

FROM: Lou Antonelli, Supervisor
Cleveland Local Claims

SUBJECT: Claim Numbers: 734 LP 04168 (State of Ohio)
734 LP 32767 (U.S. EPA)
Our Insured: Budoff Iron & Metal

Attached please find a letter I recently sent to defense counsel regarding the above cases.

I have also paid our pro-rata share, which is 35.15% of the total billing.

As we discussed, we are accepting coverage for the periods of August 27, 1968 through August 27, 1971. The agency who supplied us with certificates of insurance has been our agent for many years, at least since the mid-40's, and has a good reputation. They produce quite a bit of business for us in their area. In fact, they still are the agent for the insured, and Hartford does write Automobile coverage with them. They will testify that the insured did have General Liability coverage with The Hartford for the above period, and the hard evidence of the certificates of insurance are proof. The certificates bear valid Hartford policy numbers, and also list limits of liability.

I also checked with Lynn Thoreson who worked in the Akron office in the early 70's. She did remember that we insured Budoff when she first started, and she handled several

claims with them. She is the only one in the office who would remember this, as no one in the Claim Department was here at that time, nor was anyone in the Casualty Underwriting Department here at that time.

I tried to run IM06's, however I was told that the computers did not have information going that far back. I tried looking in the abstract drawers as well, however we only keep those for ten years, thus they have been destroyed.

Lynn and I discussed this and we are convinced that we would lose any battle over the insurance issue should we decide to fight it. The certificates of insurance, along with the agent's testimony and our lack of ability to prove that the policies didn't exist, coupled with Lynn's recognition that we did insure them back in the early 70's would certainly do us in.

We have working agreements on all of the other files, and now we can add these two to the list. The attorney has a copy of our proposed agreement which he is to circulate among all the carriers for the signatures so that we can formalize things.

FILED
JUL 17 1995
CLERK

(2)

No. 94-2044

In The

Supreme Court of the United States

October Term, 1995

INDUSTRIAL EXCESS LANDFILL, INC.,
HYBUD EQUIPMENT CORPORATION
and HYMAN BUDOFF,

Petitioners,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court abused its discretion by exercising jurisdiction, based on diversity of citizenship, over a declaratory judgment action to determine rights to insurance coverage.

2. Whether the district court denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution by granting summary judgment in favor of Respondent.

3. Whether the district court correctly applied Federal Rule of Evidence 1004 in granting summary judgment in favor of Respondent.

4. Whether the district court's *sua sponte* dismissal of Petitioners' counterclaim, in conjunction with its grant of summary judgment in favor of Respondent, denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution.

5. Whether the district court's denial of Petitioners' post-judgment motion denied Petitioners equal protection of the laws or due process under the Fifth Amendment of the United States Constitution.

PARTIES

Petitioner Industrial Excess Landfill, Inc. is an Ohio corporation with its principal place of business in Akron, Ohio. Industrial Excess Landfill, Inc. is owned and/or controlled by Petitioner Hyman Budoff.

Petitioner Hybud Equipment Corporation is an Ohio corporation with its principal place of business in Akron, Ohio. Hybud Equipment Corporation is owned and/or controlled by Petitioner Hyman Budoff.

Petitioner Hyman Budoff is an individual. Mr. Budoff is a citizen of the State of Ohio.

Respondent Hartford Accident and Indemnity Company is an insurance company organized under the laws of Connecticut with its principal place of business in Hartford, Connecticut.*

---

* In accordance with Rule 29.1 of the Revised Rules of the Supreme Court of the United States, Respondent states that Hartford Accident and Indemnity Company is a wholly owned subsidiary of the Hartford Fire Insurance Company which, in turn, is a wholly owned subsidiary of ITT Hartford Group, Inc. which, in turn, is a wholly owned subsidiary of ITT Corporation, a publicly owned corporation. Hartford Accident and Indemnity Company has no non-wholly owned subsidiaries.

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No. 94-2044

In The

Supreme Court of the United States

October Term, 1995

INDUSTRIAL EXCESS LANDFILL, INC.,
HYBUD EQUIPMENT CORPORATION
and HYMAN BUDOFF,

Petitioners,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT HARTFORD ACCIDENT AND INDEMNITY COMPANY IN OPPOSITION

The Respondent, Hartford Accident and Indemnity Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Industrial Excess Landfill, Inc., Hybud Equipment Corporation, and Hyman Budoff.

OPINIONS BELOW

This was a declaratory judgment action brought in the United States District Court for the Northern District of Ohio by Respondent, Hartford Accident and Indemnity Company ("Hartford"), pursuant to 28 U.S.C. § 2201. Hartford sought a declaration of rights as to Petitioners' demands upon Hartford for insurance coverage for two environmental claims brought against Petitioners. By Memorandum and Opinion filed May 7, 1993, the district court granted Hartford's motions for partial summary judgment and dismissed Petitioners' counterclaim, thereby resolving all claims in favor of Hartford.

The Sixth Circuit affirmed the judgment by *per curiam* opinion filed January 27, 1995. The Sixth Circuit denied Petitioners' motion for rehearing *en banc* by order filed March 15, 1995.

All of the foregoing orders are unpublished; however, the orders are reproduced in the Appendix to the Petition for Certiorari (App. A1-3; A4; A16-23.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Sixth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right from a final order of the district court in favor of Respondent.

The jurisdiction of the United States District Court for the Northern District of Ohio was invoked pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Declaratory Judgment Act, 28 U.S.C. § 2201
2. Fed. R. Civ. P. 56
3. Fed. R. Civ. Evid. 1004
4. U. S. Const. Amend. V
5. Fed. R. App. P. 4(a)(4)

STATEMENT OF FACTS

Hartford Accident and Indemnity Company ("Hartford") commenced this action for declaratory judgment against Industrial Excess Landfill, Inc., Hybud Equipment Corporation, and Hyman Budoff ("Petitioners") in the United States District Court for the Northern District of Ohio. Hartford sought a declaration of the rights and obligations of the parties under five liability insurance policies either issued, or allegedly issued, by Hartford to the Petitioners. The gravamen of the complaint was that Hartford was not obligated to defend or indemnify the Petitioners for an underlying Superfund action (42 U.S.C. § 9601 *et seq.*), brought by the United States against Petitioners entitled *United States of America v. Industrial Excess Landfill, et al.*, Case No. 5:89 CV 1988 ("the *USEPA* case".) Generally, the USEPA sought remediation of a closed landfill located in Stark County, Ohio, which was owned

by Petitioner Industrial Excess Landfill, Inc. and operated by the Petitioners.

Federal jurisdiction for the declaratory action was based on diversity of citizenship (28 U.S.C. § 1332) in that Hartford is a citizen of Connecticut, the Petitioners are citizens of Ohio, and the amount in controversy exceeded $50,000.00. The district court is authorized to grant the type of relief requested by Hartford pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

The underlying *USEPA* case was pending in the Northern District of Ohio before District Judge John M. Manos. In its filing documents, Hartford indicated that its declaratory judgment action was related to the *USEPA* case; accordingly, this action was also assigned to Judge Manos.

A. The 1981 to 1985 Policies

Hartford issued Policy No. 45 CBP 132102 with a policy period of August 31, 1981 to June 30, 1984, which included the standard pollution exclusion.

Hartford issued Policy No. 45 CBP NHO404, with a policy period of June 30, 1984 to June 30, 1985, which included the standard pollution exclusion. (These will be referred to collectively as "the 1981 to 1985 policies.")

B. The Alleged 1968 to 1971 Policies

Petitioners made their original demand for coverage only pursuant to the 1981 to 1985 policies. By letter dated June 16, 1988, Petitioners made an amended demand upon Hartford for policies which they claimed Hartford

had issued to Petitioners between 1968 and 1971. (These will be referred to as "the alleged 1968 to 1971 policies.") Petitioners produced certificates of insurance which listed one of the three Petitioners, Hybud Equipment Corporation. After extensive discovery, Petitioners did not produce any policy documents for any of the alleged 1968 to 1971 policies. Hartford conducted a search of its files to locate any information, including policy documents, relative to the alleged 1968 to 1971 policies. No policies or documents material to Petitioners' alleged policies were ever found.

C. The Sphere Drake Case

Prior to commencement of this action, Petitioners had commenced a declaratory judgment action in the Summit County (Ohio) Court of Common Pleas against another insurance company, Sphere Drake Insurance Company, Ltd. ("the *Sphere Drake* case"). In the *Sphere Drake* case, Petitioners sought defense for three environmental actions pending against them, including the *USEPA* case. Although Petitioners had made demands for coverage against Hartford and numerous other insurers, they did not join Hartford or any other insurers in the *Sphere Drake* case. The policy at issue in *Sphere Drake* contained a standard pollution exclusion.[1] Among the issues litigated

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[1] The pollution exclusion contained in the 1981 and 1985 Hartford policies is identical to the pollution exclusion construed and applied by the Ohio Supreme Court in *Hybud Equipment Corporation et al. v. Sphere Drake Insurance Company*, 46 Ohio S. 3d 657, 597 N.E.2d 1096 (1992).

in the *Sphere Drake* case was the interpretation and application of the standard pollution exclusion to the *USEPA* case. Petitioners lost the *Sphere Drake* case on appeal to the Supreme Court of Ohio. *Hybud Equipment Corp., et al. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657, 597 N.E. 2d 1096 (1992), *cert. denied*, 113 S.Ct. 1585 (1993).

D. The Pleadings

Petitioners moved to dismiss Hartford's complaint on several grounds, including: (1) no "actual controversy" within the meaning of 28 U.S.C. § 2201; (2) no jurisdiction in that Hartford had not "properly denied" the Petitioners' claim before filing the action; (3) no jurisdiction for Hartford's failure to join other insurers as necessary or indispensable parties; (4) the amount in controversy was less than the $50,000 jurisdictional amount; and (5) the court should abstain from jurisdiction because the action would have a "broad impact on state policy." The district court denied Petitioners' motion to dismiss.

Petitioners responded with a three-count counterclaim against Hartford for breach of contract, the tort of "bad faith" (based on its alleged failure to defend Petitioners) and the tort of "infliction of emotional distress."[2] Hartford answered the breach of contract count but moved to dismiss the tort counts. The district court granted, with prejudice, Hartford's motion to dismiss the

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[2] Petitioners alleged the infliction of emotional distress on behalf of the corporate entites as well as Petitioner Hyman Budoff.

emotional distress claim and allowed the "bad faith" count to stand.

On December 19, 1991, the State of Ohio commenced an action against Petitioners in the Northern District of Ohio styled *State of Ohio ex. rel. Fischer v. Industrial Excess Landfill, Inc., et al.*, Case No. 5:91 CV 2559 ("the *State of Ohio* case"). The *State of Ohio* case paralleled the *USEPA* case, seeking reimbursement for any amount the state was required to spend in connection with remediation of the site, as well as civil fines and penalties against Petitioners.[3] Petitioners tendered defense of the *State of Ohio* case to Hartford, and the district court granted Hartford leave to amend its complaint to include the State of Ohio claim in the declaratory judgment action. Petitioners responded with a motion to dismiss which was substantively identical to their original motion. The district court denied the motion and Petitioners responded with a three-count counterclaim, including the emotional distress count previously dismissed with prejudice by the district court. The district court again dismissed the emotional distress claim.

E. Discovery

Hartford and the Petitioners engaged in extensive written and oral discovery. In particular, Hartford responded to several requests for written discovery related to Hartford's knowledge of the existence and/or terms and conditions of any policies issued by Hartford to the Petitions. No copies of the missing policies were

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[3] The *State of Ohio* case was also assigned to Judge Manos.

ever produced by Petitioners. After searching and reviewing voluminous records in response to written discovery, Hartford determined that it had no copies of the alleged missing policies nor any other documents in its possession related to any such policies. Petitioners also subpoenaed records from the Ostrov Insurance Agency ("Ostrov") and had informal access to its files and personnel as well. Ostrov produced no policy documents related to the alleged 1968 to 1971 policies.

F. Hartford's Motions for Summary Judgment

On June 22, 1992, Hartford filed its motion for partial summary judgment for the 1981 to 1985 policies on grounds that the standard pollution exclusion barred coverage for the *USEPA* and the *State of Ohio* claims (R. 106). On July 2, 1992, Hartford filed a second motion for partial summary judgment as to the alleged 1968-1971 policies on grounds that defendants could not establish the existence of those policies or the terms of coverage for the *USEPA* and the *State of Ohio* claims (R. 116, R. 117). Both motions were fully briefed. Petitioners attached numerous evidentiary exhibits in support of their position.

On September 16, 1992, prior to any ruling on Hartford's motions, the Supreme Court of Ohio issued its opinion in the *Sphere Drake* litigation.[4] The Supreme Court of Ohio held that, under Ohio law, the standard pollution exclusion barred coverage to Petitioners for the

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[4] *Hybud Equipment Corp. v. Sphere Drake Insurance Co.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992).

USEPA case. On October 27, 1992, Hartford moved for partial summary judgment on the additional ground that, under Ohio's doctrine of collateral estoppel, the *Sphere Drake* decision barred Petitioners from re-litigating the meaning of the pollution exclusion or its applicability to the *USEPA* case.

G. The District Court's Ruling

On May 7, 1993, the district court issued its memorandum and opinion granting summary judgment in favor of Hartford. As to the 1981-1985 policies, the district court found that: (1) under Ohio's doctrine of collateral estoppel, the *Sphere Drake* litigation was dispositive of the issue presented and Hartford was entitled to judgment for the *USEPA* case; and (2) the State of Ohio complaint was factually indistinguishable from the *USEPA* complaint and, pursuant to the *Erie* doctrine, Hartford was entitled to summary judgment as to the *State of Ohio* case.

As to the alleged 1968 to 1971 policies, the court found that Petitioners produced no evidence (after three years of discovery) which could establish the terms or conditions of the policies. Absent such evidence, Petitioners could not establish their rights to coverage and, thus, Hartford was entitled to summary judgment. The district court also dismissed the Petitioners' counterclaim, ruling that its declaratory judgment in favor of Hartford necessarily defeated the counterclaim. (See May 7, 1993 Memorandum and Opinion, R. 145; Petition, Appendix A16-23).

On May 20, 1993, Petitioners filed a motion for "reconsideration" of the district court's May 7, 1993 order (R. 147). Petitioners attached a specimen policy form to their motion which they asserted had been discovered only in the week following the district court's May 7, 1993 order. Although Petitioners acknowledged that the form was not a Hartford policy form and was not part of the alleged 1968 to 1971 policies, Petitioners nevertheless asserted relevance in that the form was "the same or substantially the same" as policy forms used by Hartford from 1968 to 1971.[5] In addition to asserting their "new evidence," Petitioners took the district court to task for not explaining, in sufficient detail to satisfy Petitioners, its rationale for rejecting various contentions made in opposition to Hartford's motions. Hartford timely responded to the post-judgment motion on June 3, 1993. That same day, prior to any ruling by the district court on the post-judgment motion, Petitioners filed their first notice of appeal. On June 10, 1993, the district court, apparently believing Petitioners were abandoning their attempt at post-judgment relief, denied the post-judgment motion "as moot." Petitioners then filed their second notice of appeal, purporting to appeal only from the June 10, 1993 order denying their post-judgment motion.

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[5] Aside from the lack of basic evidentiary foundation, the document rebuts this assertion on its face in that the words, "**1966 Policy Jacket Specimen**" and "**Orig. Printing February 1990**" appear in bold type on the form. Petitioners could not identify the author or publisher of the document.

H. The Sixth Circuit's Rulings

On June 25, 1993, the Sixth Circuit, *sua sponte* dismissed Petitioners' first notice of appeal as ineffective pursuant to Federal Rule of Appellate Procedure 4(a)(4). Petitioners then filed a third notice of appeal which purported to appeal from "all adverse rulings" of the district court.

Hartford moved the Sixth Circuit to dismiss the second and third notices of appeal for lack of appellate jurisdiction and to remand the case to the district court for further ruling on Petitioners' post-judgment motion. Petitioners resisted the motion. On November 10, 1993, the Sixth Circuit denied Hartford's motion to dismiss Petitioners' appeals and consolidated their second and third notices of appeal.

After briefing and oral argument, the Sixth Circuit filed its *per curiam* order of January 27, 1995, affirming the district court's judgment in all respects. Petitioners filed a motion for re-hearing *en banc*; the motion was denied by the Sixth Circuit by its order of March 15, 1995.

Petitioners seek a writ of certiorari from the Sixth Circuit's January 27, 1995 and March 15, 1995 orders.

SUMMARY OF ARGUMENT

This case presents no issue appropriate for this Court's exercise of discretionary jurisdiction.

Petitioners attempt to manufacture an issue for review by claiming a division among circuits, and a lack of guidance by this Court, as to the proper exercise of

federal jurisdiction over declaratory judgment actions involving interpretation of state law. No such controversy exists. Contrary to Petitioners' claim that this Court has not provided guidance since *Brillhart v. Excess Insurance of America*, 316 U.S. 491 (1942), this Court re-addressed this issue during the last Term. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. 4544 (1995). In *Wilton*, this Court reaffirmed its teaching that jurisdiction over declaratory judgment actions is not susceptible to rigid, formulaic analysis and remains primarily one of discretion with the district court since it is usually, if not always, in the best position to evaluate the circumstances under which relief is sought. In the case at bar, the district court exercised its discretion to retain jurisdiction over this case. This case presents no issue which was not explicitly dealt with by this Court in *Wilton*.

Moreover, the purported split of authority as to declaratory judgment jurisdiction simply does not exist in the context presented here. Every decision cited by Petitioners contains a common circumstance absent here: existence of a concurrent, related action in another forum giving rise to the possibility of conflicting or inconsistent rulings on the same fact or issue. Absent this crucial circumstance, considerations of equity, comity, and federalism, which are at the heart of any discretionary abstention, disappear. There was no parallel case pending between the parties and this action was assigned to the same district judge who was presiding over the underlying actions at issue. Simply stated, there was no other forum with which the district court's exercise of judicial authority could conflict.

The remaining questions present no basis for discretionary review by this Court. Petitioners merely express displeasure with the outcome below and seek this Court's review by the expedient of claiming that these adverse rulings amount to constitutional violations. Such claims are utterly devoid of merit.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT'S EXERCISE OF JURISDICTION WAS APPROPRIATE

Petitioners' primary contention for certiorari is that the district court was required to abstain from jurisdiction since the dispute involved questions of insurance coverage to be resolved by application of state law (Petition, pp. 8-15.) Petitioners attempt to conjure up deep divisions among the courts below as to the circumstances under which federal courts entertain declaratory judgment actions for insurance coverage, and declare that it has been more than 50 years since this Court has provided guidance as to "the use of declaratory judgment jurisdiction in an insurance dispute." (Petition, p. 15.)

During the last Term, this Court held that the discretionary test announced in *Brillhart v. Excess Ins. Co. of America*, 315 U.S. 491 (1942) governs the exercise of jurisdiction over declaratory judgment actions for insurance coverage. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. 4544 (1995). In *Wilton*, the district court stayed a declaratory judgment action during the pendency of a parallel state court action. The Court of Appeals followed *Brillhart*,

affirming the district court's decision based on an abuse of discretion standard. This Court framed the issue as whether the discretionary standard of *Brillhart* or the "exceptional circumstances" test of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) governed the district court's authority to exercise or refuse jurisdiction. *Wilton v. Seven Falls Co.*, 63 U.S.L.W. at 4545. This Court reaffirmed *Brillhart*, holding that the distinct features of the Declaratory Judgment Act justifies a standard vesting greater discretion with the district court. This Court reiterated its teaching of *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952) that jurisdiction in any particular case is dependent on consideration of the attendant circumstances and that the district court is best able to determine the efficacy of jurisdiction "because the usefulness of the declaratory remedy, and the fitness of the case for resolution are peculiarly within their grasp." *Id.* at 4548.

Presented with Petitioners' motion for abstention, the district court here exercised its discretion to retain jurisdiction over the case. Its decision to do so and the Sixth Circuit's affirmance are perfectly consistent with this Court's holding in *Wilton*. The circumstances presented here offer no opportunity for precedential value beyond this Court's pronouncement in *Wilton*.

Moreover, Petitioners' contention that an indiscernible pattern developed in the courts below is disingenuous. As was the case in *Wilton*, the locus of the issue as to discretionary jurisdiction in *every* case cited by the Petitioners is the propriety of exercising jurisdiction where another court of equal competence is hearing a

parallel or related matter which requires resolution of the same fact or issue.

In *Nationwide Mutual Fire Insurance Co. v. Willenbrink*, 924 F.2d 104 (6th Cir. 1991), for example, Nationwide was sued in state court by the underlying plaintiff as a defendant in the negligence action. Although Nationwide was dismissed as a defendant in the negligence action, the state court "passed all issues of coverage on the merits, to be litigated after the liability action is tried." *Id.* at 104. Nationwide then filed an action in the district court, seeking a declaration of noncoverage. The district court granted judgment in favor of Nationwide. On appeal, the Sixth Circuit found the record unclear as to whether the district court had been informed that "the state court had expressly reserved the coverage question to a later date." *Id.* at 105. In light of the "duty of comity owed by federal courts to the state courts" the Sixth Circuit remanded the case to the district court to determine whether the state court had retained jurisdiction over the coverage action. *Id.* at 105. The concern the Sixth Circuit sought to ameliorate was the possibility of a direct conflict of judicial power with a court of equal competence; it did not suggest, even by remote implication, that the district court should decline jurisdiction merely because the declaratory action might require application of state insurance law.

Similarly, in *Omaha Property and Casualty Insurance Co. v. Johnson*, 923 F.2d 446 (6th Cir. 1991), discretionary exercise of jurisdiction arose from conflicting rulings from a state and federal court on the same factual determination. In *Omaha Property*, the underlying plaintiff sued the insured in state court arising from an auto

accident involving the insured's son. The insurer defended the action under reservation but sued in federal court, seeking a declaration of noncoverage. In the underlying tort case, the insured moved for summary judgment, contending that the family purpose doctrine and the theory of negligent entrustment were not applicable under state law. The factual predicate of the motion was that the insured had expressly told the son not to drive the car. The state court denied the motion, holding that questions of fact existed as to the son's permissive use of the auto. In the declaratory action for coverage, however, the district court came to the opposite conclusion, granting summary judgment based upon its factual finding that the minor had no reasonable belief of his entitlement to the use of the car. In holding that the exercise of jurisdiction over the declaratory judgment action was inappropriate, the Sixth Circuit again focused its analysis on the confusion of "dual decisions" from two competent courts on the same question. *Omaha Property*, 923 F.2d 446, 448 (6th Cir. 1991). The Sixth Circuit did not suggest, let alone hold, that federal courts should generally abstain from applying state law in declaratory judgment actions.

The remaining cases cited by Petitioners involve the same concern. *See e.g., Allstate Insurance Co. v. Mercier*, 913 F.2d 273 (6th Cir. 1990) (jurisdiction best exercised by the same court that will hear the underlying tort claim); *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*, 791 F.2d 460 (6th Cir. 1986) (exercise over declaratory judgment inappropriate where underlying suits, which turned on same factual question, were pending in another federal court); *American Home Assurance Co. v.*

Evans, 791 F.2d 61 (6th Cir. 1986) (exercise over declaratory judgment inappropriate where declaratory action raised complicated issues of fact and state court had accepted jurisdiction of same subject matter); *Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323 (6th Cir. 1984) (exercise of jurisdiction over declaratory judgment inappropriate where plaintiff attempted to "have federal court do what state court has already refused to do.")

Although these cases present a variety of factual and procedural backdrops, the unifying principle is that all address the fundamental problem of a federalist court system: two courts entertaining the same issue with the possibility of inconsistent or conflicting results. That circumstance is conspicuous by its absence in this case. First, there was no other litigation between Hartford and Petitioners. In addition, the district court which exercised jurisdiction over this action was also presiding over the underlying actions at issue in the declaratory action. Simply stated, there was no other forum with which the district court's decision could conflict. Thus, the position urged by the Petitioners – that federal courts should generally abstain from declaratory actions requiring application of state law – has not been propagated in any case cited to this Court.

Finally, the district court was not without guidance as to the construction of the pollution exclusion under state law. The Supreme Court of Ohio had construed the same pollution exclusion and applied it to the same complaint to bar coverage. Under these circumstances, no prediction of state law is required of the district court nor uncertainty as to the result.

II. THE COURTS BELOW CORRECTLY APPLIED THE STANDARD FOR SUMMARY JUDGMENT

Petitioners next seek review by contending that summary judgment was improvident and "amounts to a violation of due process and equal protection of law." (Petition, pp. 15-19.) Petitioners cite no case in support of their proposition that summary judgment in a private, civil action violates Fifth Amendment protections. Rather, Petitioners re-present the same "facts" and arguments made below with an unsupported assertion that a metaphorical pendulum has swung too far in favor of summary judgment and that the courts below should be "reminded" as to the scope of summary judgment. (Petition, p. 16.) It is a transparent attempt to have this Court re-weigh the record below and come to a different conclusion. There is no issue appropriate for discretionary review.

Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment where, after adequate time for discovery, a party who will bear the burden of proof at trial fails to establish the existence of an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The substantive law identifies which facts are material and the judge must view the evidence presented "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Although the movant bears the initial burden, once it establishes the absence of an essential element of the nonmovant's case, a burden of production shifts to the nonmovant to demonstrate a material question as to an element essential to the nonmovant's case. To meet its

burden, the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and the mere existence of some alleged factual dispute will not defeat an otherwise proper motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As this Court made abundantly clear in *Celotex*, there is no express or implied requirement that the movant produce affidavits or other affirmative evidence *negating* the nonmovant's claim. *Celotex*, 477 U.S. at 323.

Examination of the district court's May 7, 1993 memorandum demonstrates that the court applied these standards precisely. The thrust of the motion for summary judgment as to the alleged 1968 to 1971 policies was that the Petitioners demanded benefits under an alleged written contract but, after three years of discovery, there was a void of evidence which would establish the terms and conditions of any such contracts. Petitioners responded with the evidence summarized in their Petition (see Petition, pp. 16-18) except for the "specimen policy" now asserted.[6] Applying Ohio substantive law, the district

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[6] As set forth in the Statement of Facts, Petitioners attached the specimen policy to its motion for reconsideration as "newly discovered evidence" a week *after* the district court granted summary judgment. Although Petitioners' affidavit acknowledged that they could establish no evidentiary link between the document and either Hartford or Petitioners, they nevertheless asserted it was similar to forms used by Hartford in the relevant era. The document refutes this assertion on its face. (R. 147.)

court held that Petitioners would carry the burden of proof at trial as to the express terms and conditions relied upon "for the policy and contract are the basis of the insurer's obligation and measure of its liability." R. 145, Memorandum of Opinion; Appendix to Petition, A22-23 quoting *Lynd v. Sandy & Beaver Valley Farmers Mutual Ins. Co.*, 103 Ohio App. 408, 145 N.E.2d 453 (1957). The district court found that Petitioners produced some evidence of policy issuance but specifically found that this would not meet Petitioners' burden at trial to prove the terms and conditions which would entitle them to prevail. Absent such evidence, summary judgment was appropriate.

Petitioners overlook the salient point of the judgment below by merely re-arguing that they produced some evidence as to existence; Ohio law requires proof of the specific terms which would entitle Petitioners to relief. Petitioners cite no law to the contrary nor any basis upon which this Court should exercise discretionary review.

III. THE DISTRICT COURT CORRECTLY APPLIED FEDERAL RULE OF EVIDENCE 1004 TO THE EVIDENCE

Petitioners contend that this Court should grant discretionary review with respect to the district court's alleged failure to "recognize and apply" Federal Rule of Evidence 1004. (Petition, pp. 19-21.) This contention suffers from two fundamental defects: (1) the district court's application of Fed. R. Evid. 1004 was not raised on appeal to the Sixth Circuit, and (2) the record establishes that the district court applied Fed. R. Evid. 1004 in precisely the manner urged by Petitioners. Petitioners merely dispute

the district court's ruling as to the legal significance of that evidence.

It is axiomatic that issues not raised below may not be raised on petition for certiorari absent exceptional circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992). There is no mention anywhere in the record as to the district court's consideration or application of Fed. R. Evid. 1004. As this assignment of error was not previously raised, Petitioners claim of errors must fail on this basis alone.

Generally, Fed. R. Evid. 1004 provides that an original document is not required to prove the contents of a writing if the contents can be established by other means. Petitioners simplistically argue that since the district court found the certificates of insurance insufficient to establish the *terms* of any policy issued to Petitioners, it follows that the district court failed to "recognize and apply" Fed. R. Evid. 1004. Petitioners' proposition is directly refuted by the district court's opinion:

> The nature of an insurer's obligation is not altered or impaired because an original or a complete copy of the policy cannot be produced. *See* Couch on Insurance 2d, *Evidence*, § 79:6. However, when an original is lost or destroyed the party seeking to enforce the policy has the burden of proving its issuance and the terms it contained. *Id.; Lynd v. Sandy & Beaver Valley Farmers Mut. Ins. Co.*, 103 Ohio app. 408, 145 N.E.2d 453 (1957). Therefore, under Ohio law, "in order to recover . . . the express terms and conditions relied on must be proven, for the policy and contract are the basis of the insurer's obligation and measure of its liability." *Lynd*, 145

> N.E.2d at 456. The defendants' certificates, affidavits and documents do not provide any evidence of the specific coverages, conditions, terms or definitions of the policies at issue.

See May 7, 1993 Memorandum and Opinion, R. 145.; Petitioner, Appendix A23.

The district court's opinion makes clear that it *did* consider Petitioners' secondary evidence but, viewing it through the "prism of the substantive law," found it insufficient. As the Petitioners failed to raise the issue below and the district court applied Fed. R. Evid. 1004 correctly, there is no basis present for the exercise of this Court's discretionary review.

IV. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONERS' COUNTERCLAIMS

Petitioners next contend that the district court's dismissal of Petitioners' counterclaims, simultaneous with its entry of summary judgment, violated Petitioners' Fifth Amendment rights. Once again, Petitioners cite no case in support of their constitutional claim nor any other basis for this Court's discretionary review.

The scope of this action was for insurance coverage for two underlying cases. Hartford contended it owed no coverage; Petitioners' counterclaim contended that Hartford did owe coverage and sought tort liability based upon Hartford's alleged breach of a known contractual duty. The *sine qua non* to all of the claims of the lawsuit was whether Hartford owed any contractual duty to Petitioners.

Count I of Petitioners' counterclaim alleged breach of the same contract for which Hartford sought a declaration of non-coverage (R. 23). Thus, Count I of Petitioners' counterclaim was simply the mirror image of Hartford's complaint. Petitioners' breach of contract action necessarily fails if, as a matter of law, Hartford owed no contractual duties to Petitioners. Count II of Petitioners' counterclaim alleged the tort of bad faith. Under Ohio law, an action for "bad faith" cannot lie where the insurer held a justifiable belief that it owed no contractual duty. *Wasserman v. Buckeye Union Casualty*, 32 Ohio St. 69, 290 N.E.2d 837 (1972). Hartford had more than a justifiable belief; it owed no contractual duty to Petitioners as a matter of law.

Petitioners had ample opportunity to respond on the issues of fact and law presented by this case (R. 141; 142; 147). The logical and necessary effect of the district court's ruling was that Petitioners' claim must fail for the same reasons which justify summary judgment in favor of Hartford. Petitioners offer nothing to warrant this Court's discretionary review.

V. THE COURTS BELOW CORRECTLY DENIED PETITIONERS' MOTION FOR POST-JUDGMENT RELIEF

Finally, Petitioners claim constitutional error in the denial of their post-judgment motion. Petitioners cite no authority for their claim. Petitioners have declined and even resisted efforts to obtain further ruling from the district court on their post-judgment motion. Petitioners

cannot now assert error from confusion which they themselves caused, particularly where they have resisted all efforts to return to the district court for further rulings on their post-judgment motion. Moreover, the issue of the merits of Petitioners' post-judgment motion has been presented to and rejected by the Sixth Circuit; Petitioners offer no basis for this Court's discretionary review.

Petitioners' post-judgment motion presented only two bases for relief: (1) reconsideration in the form of a re-presentation of Petitioners' original arguments, and (2) consideration of the specimen policy as "newly discovered evidence" pursuant to Federal Rule of Civil Procedure 60(b). Less than two weeks after filing its motion, and prior to any opportunity for the district court to rule, Petitioners filed their first notice of appeal.[7]

This Court has made clear that the filing of a post-judgment motion tolls the time for appeal from a final judgment under Federal Rule of Appellate Procedure 4(a)(4). *Griggs v. Provident Consumer Discount*, 459 U.S. 56 (1982). Thus, Petitioners' right to appeal was not at risk when they filed their first notice of appeal. Given the timing of Petitioners' notice of appeal, the district court apparently concluded that Petitioners wished to abandon all post-judgment relief and appeal from the district court's May 7, 1993 order. The district court denied the post-judgment motion "as moot" on June 10, 1993.

Following the Sixth Circuit's dismissal of their first appeal for lack of jurisdiction, Petitioners made clear

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[7] Hartford's response to the motion was not due until the day Petitioners filed their notice of appeal.

their intent to forego any further ruling from the district court by filing a third notice of appeal from "all adverse rulings" of the district court. Moreover, Petitioners' resisted another opportunity to seek further ruling from the district court when they opposed Hartford's motion in the Sixth Circuit to remand the case to the district court for ruling on the post-judgment motion. A party may not complain on appeal of errors that he himself invited or provoked the court to commit. *Harris v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991). The doctrine of invited error is a branch of the doctrine of waiver and prevents a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. *Id.* at 61. Petitioners seek to take advantage of confusion created by their own procedural misadventures and have waived any right to further ruling on their post-judgment motion by deliberately foregoing and even resisting a clear opportunity to do so. *See, e.g., Huang v. Board of Governors*, 902 F.2d 1134 (4th Cir. 1990) (litigant cannot have it both ways by opposing motion then claiming court abused its discretion by ruling as it requested.)

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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